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CHOICE OF LAW IN MICHIGAN: JUDICIAL METHOD AND THE POLICY-CENTERED CONFLICT OF LAWS

ROBERT A. SEDLER†

INTRODUCTION

I have long been interested in the relationship between *approaches* to choice of law and the *process* by which a court decides a case presenting a choice of law issue. Academic commentators generally tend to focus on the preferred approach to the resolution of choice of law issues,¹ and the choice of law "revolution" in this country has purportedly developed in the context of the courts abandoning the "traditional" approach of state-selecting rules in favor of one of the various "modern" approaches to choice of law.² I maintain that the matter of the preferred approach to choice of law must be distinguished from the process by which a court resolves choice of law issues. The process

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1. For a review of "modern" approaches to choice of law, see R. SEDLER & R. CRAMTON, *SUM AND SUBSTANCE OF CONFLICT OF LAWS* 45-50, 67-75 (2d ed. 1981). For a representative sampling of the academic debate, see Hay, *Reflections on Conflict-of-Laws Methodology*, 32 *HASTINGS L.J.* 1644 (1981); Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 *CALIF. L. REV.* 577 (1980); Reese, *Choice of Law: Rules or Approach*, 57 *CORNELL L. REV.* 315 (1972); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 *HOFSTRA L. REV.* 149 (1981); von Mehren, *Choice of Law and the Problem of Justice*, 41 *LAW & CONTEMP. PROBS.* 27 (Spring 1977). For the author's view that interest analysis is the preferred approach to the resolution of choice of law issues, see Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 31 *MERCER L. REV.* 1 (1983) [hereinafter cited as Sedler, *Interest Analysis and Forum Preference*]; Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 *U.C.L.A. L. REV.* 181 (1977) [hereinafter cited as Sedler, *Governmental Interest Approach*].

2. The "traditional" approach, in the context of conflicts torts cases, for example, requires the application of the law of the place of the wrong which, in the event of a car accident, means the law of the place where the accident occurred. On the other hand, all of the "modern" approaches to choice of law are based to some extent on considerations of policy and fairness to the parties.

A number of courts have expressly adopted a particular "modern" approach to choice of law. For a review of the approaches adopted by various courts, see Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 *TENN. L. REV.* 975, 983-1032 (1977) [hereinafter cited as Sedler, *Rules of Choice of Law*].

by which a court resolves choice of law issues relates also to the *role* of a court in deciding a conflicts case. As I will demonstrate, the role of the court in a conflicts case is to reach a functionally sound and fair result in the case before it. A particular approach to choice of law should be relevant, as far as the process of resolving choice of law issues is concerned, only insofar as it facilitates the court's performance of that role. In the present writing, I will focus on the role of a court in a conflicts case and on the process of resolving choice of law issues. The recent decision by the Michigan Supreme Court in the companion cases of *Sexton v. Ryder Truck Rental, Inc.*, and *Storie v. Southfield Leasing, Inc.*,³ furnishes a very appropriate vehicle by which to do so.

I will begin by discussing the proper role of a court in a conflicts case and the process by which the court should go about resolving choice of law issues. Then I will discuss the *Sexton-Storie* decision with reference to that process. As will be demonstrated, the Michigan Supreme Court in *Sexton-Storie* made it clear that future choice of law issues in Michigan will be resolved by the process which I call *judicial method and the policy-centered conflict of laws*. Next I will discuss the development of choice of law in conflicts torts cases in Michigan in light of the *Sexton-Storie* decision and the choice of law process adopted by the court in that case. Finally, I will conclude with some observations about the choice of law process adopted in Michigan.

I. THE ROLE OF A COURT IN A CONFLICTS CASE AND THE CHOICE OF LAW PROCESS

There has been considerable academic debate about the proper role of a court in a conflicts case. That role depends upon the purpose of conflicts law in our legal system. Sometimes that purpose is seen as being quite grandiose. According to the Restatement (Second) of the Conflict of Laws: "Probably the most important function of choice of law rules is to make the interstate and international systems work well. Choice of law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them."⁴ It has also been contended that the purpose of conflicts law is to accommodate the interests of the states that make up the national and international legal order,⁵ and to "promote net aggregate long-term common interests."⁶

3. 413 Mich. 406, 320 N.W.2d 843 (1982).

4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment d (1971).

5. See D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 120-24 (1965).

6. McDougal, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 U.C.L.A. L. REV. 439, 473 (1979).

My own view about the purpose of conflicts law is considerably less grandiose. I see the purpose of conflicts law simply to provide functionally sound and fair solutions for those *relatively few cases that arise in practice* where the court has to make a choice of law decision. A court has to make a choice of law decision only where (1) the case is connected with more than one state⁷ and (2) the laws of the involved states differ on the point in issue.⁸ Such cases are relatively few in number for two reasons. First, despite the fact that we live in a multistate world, most transactions, and thus most cases that arise in practice, are connected with only one state. Second, even when the case is connected with more than one state, most of the time the laws of the involved states will not differ on the point in issue. Therefore, with few exceptions, conflicts cases arising in American courts are interstate cases,⁹ and whenever there exists a conflict of laws between two American states, it is almost invariably because one state has enacted a statute that changes the common law rule remaining in force in the other state,¹⁰ or in an area regulated by statute, such as wrongful death, the statutes of the involved states differ in material respects.¹¹ So, even when a case is connected with more than one state,

7. That is to say that the legally significant facts occurred in more than one state and/or the parties are not residents of the same state.

8. We generally use the two-state example because almost invariably this is what is involved in an actual case. In the rare case in which three states are involved, two of the states' laws on the point in issue usually will be the same. *See, e.g.,* Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). Perhaps unfortunately for the development of choice of law in Michigan prior to *Sexton-Storie*, the first case to present squarely the question of whether Michigan should abandon the traditional approach to choice of law, *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969), was a three-state case. See the discussion in Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 WAYNE L. REV. 829, 830-32 (1978) [hereinafter cited as Sedler, *Choice of Law in Michigan*].

9. Because most of the conflicts cases coming before American courts are interstate cases, conflicts law in this country developed with reference to the interstate case. International cases are accommodated within the framework established for interstate cases, although relevant differences may be taken into account by the courts.

10. For example, up until fairly recently, close to half of the states had guest statutes, so it is not surprising that the great majority of conflicts torts cases in the past have involved the issue of guest-host immunity. Now, since more states are enacting comparative negligence statutes or courts are adopting comparative negligence as the new common law rule, conflicts cases involving the issue of contributory fault are increasing, and this issue appears to be supplanting guest-host immunity as the primary issue in conflicts torts cases. Furthermore, since most other torts immunities, such as intra-family immunity, have been abolished or are on the wane, there are relatively few conflicts cases involving these issues today.

11. In the past, many wrongful death acts imposed a limit on the amount recoverable, which frequently gave rise to a conflict of laws in wrongful death cases. Now that practically all of the states have abolished these limits or have substantially revised them upwards, this fertile source of conflicts litigation has practically disappeared.

usually the case will not present a choice of law issue. Thus, in practice the number of conflicts cases coming before the courts of a particular state, and in fact the aggregate number of conflicts cases coming before all courts, is relatively few.

The conflicts cases that arise in practice are not inherently difficult to decide. The great majority of these cases are in the torts area, and for reasons that I have explained elsewhere,¹² the cases tend to fall into certain *fact-law patterns*.¹³ The courts that have abandoned the traditional approach to choice of law¹⁴ have had no difficulty in deciding these cases, and they have reached fairly uniform *results* regardless of the particular "modern" approach to choice of law that they are purportedly following.¹⁵ Conflicts contracts cases also can be put into certain fact-law patterns, and the cases that arise in practice tend to involve recurring problems, such as the statute of frauds, built-in limitations periods, and claims of usury.¹⁶ Conflicts cases in the property area are exceedingly rare. Thus, not only are there relatively few conflicts cases that arise in practice, but those that do arise involve a limited number of choice of law issues, which at least in the torts area, the courts have resolved in a fairly uniform fashion.

It is precisely because there are relatively few conflicts cases that arise in practice and precisely because these cases are not inherently difficult to resolve, that I submit that the purpose of conflicts law and the role of a court in a conflicts case is to provide functionally sound and fair solutions to the choice of law issues presented in those cases.¹⁷ Therefore, the choice of law process should operate with reference to the particular case presented for decision and within a framework that will produce a functionally sound and fair solution in that case.¹⁸

12. Sedler, *Rules of Choice of Law*, *supra* note 2, at 980-81.

13. In the torts area, the fact part of the fact-law pattern relates to the states where the parties reside, the state where the harm occurred, and if it differs, the state where the act or omission causing the harm occurred. The law part relates to whether the law in question allows or denies recovery, whether it reflects an admonitory or a compensatory policy or both, and whether it involves other considerations, such as those applicable to worker's compensation. *Id.* at 981.

14. Now that Michigan has joined the states that have abandoned the traditional approach, at least in torts cases, the breakdown among the 50 states and the District of Columbia is as follows: abandoned the traditional approach: 31; continue to adhere to the traditional approach: 14; have not yet passed on the question: 6. See Sedler, *Interest Analysis and Forum Preference*, *supra* note 1, at 1-2 n.4.

15. See the discussion of this point in Sedler, *Rules of Choice of Law*, *supra* note 2, at 1032-41.

16. *Id.* at 980 n.29; Sedler, *Interest Analysis and Forum Preference*, *supra* note 1, at 6.

17. This point is developed further in Sedler, *Interest Analysis and Forum Preference*, *supra* note 1, at 9-13.

18. The problem with any "rules approach" to choice of law, whether it be the broad, state-selecting approach of the original Restatement, or one of "narrow, policy-

Some years ago, I set forth an analysis of the choice of law process in terms of *judicial method and the policy-centered conflict of laws*.¹⁹ I maintained that the courts should, in accordance with the common law tradition, apply judicial method to the resolution of conflicts problems, as they applied it to other areas of law.²⁰ Under judicial method, the court would render the choice of law decision with reference to the fact-law pattern presented in the particular case. The decision in that case would serve as a precedent for decisions in other cases, and the decision's rationale would serve as a guide to the resolution of future cases presenting different fact-law patterns. In time, depending on the number and kinds of cases that arose in each state, a body of conflicts law would emerge in that state through the normal workings of binding precedent and *stare decisis*.²¹

I further maintained that the criteria for the choice of law decision should be considerations of policy and fairness to the parties. The rationale here was that the *criteria* for the choice of law decision—the decision to displace the forum's own law and to look to the law of another state in whole or in part for the rule of decision in the case—should relate to the *justification* for such displacement. The forum's law properly should be displaced in a particular case only where policy considerations, such as recognition of the legitimate interest of another state in having its law govern the transaction,²² or a concern for fairness, such as protecting the reasonable expectations of

based rules," *see, e.g.*, Reese, *supra* note 1; Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981), is that built into that kind of approach is the possibility of unsound results in particular cases, as its proponents readily admit. Their contention is that the advantages that a rules approach supposedly bring outweigh the possibility of an "occasional doubtful result." Reese, *supra* note 1, at 322, 334. This possibility is not built into a choice of law process that operates with reference to the particular case presented for decision. See the criticism of a "rules approach" in Sedler, *Governmental Interest Approach*, *supra* note 1, at 210-16.

19. Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27 (1967) [hereinafter cited as Sedler, *Babcock v. Jackson in Kentucky*]. For other writings developing this analysis, see Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. (1970); Sedler, *Judicial Method Is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents*, 61 KY. L.J. 378 (1972-73).

20. See Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 19, at 42-45, 57-58.

21. *Id.* at 82-87.

22. This is the case of the "false conflict," brought in the disinterested state. Since in this circumstance the forum does not have a real interest in applying its own law in order to implement the policy reflected in that law, while the other involved state does, the forum should apply the law of the only interested state. In practice, this is the most common situation where the forum displaces its own law. See Sedler, *Governmental Interest Approach*, *supra* note 1, at 186-87, 223-27; Sedler, *Rules of Choice of Law*, *supra* note 2, at 1034.

the parties, dictate the displacement of the forum's law in favor of the law of another state. By limiting the criteria for displacement to the justification for displacement, the court would be more likely to make a functionally sound and fair choice of law decision in the particular case. It was my submission, therefore, that the law of the forum should be displaced only when considerations of policy or fairness to the parties required such displacement in the particular case. In the absence of such considerations, the law of the forum should apply, just as it would in a domestic case.

Under judicial method and the policy-centered conflict of laws, the choice of law process would operate in accordance with the following premises: (1) the basic law is the law of the forum, which will be applied in the absence of valid reasons for its displacement;²³ (2) the choice of law decision will be made with reference to the fact-law pattern presented in the particular case; and (3) the choice of law decision will be based on considerations of policy and fairness to the parties.

The operation of the choice of law process in terms of judicial method and the policy-centered conflict of laws is analytically distinct from any particular *approach* to resolution of choice of law issues. A court can apply judicial method and the policy-centered conflict of laws without necessarily adopting any particular approach to choice of law.²⁴ As we will see, this is precisely what the Michigan Supreme Court did in *Sexton-Storie*.²⁵

I would further submit that when we look to the *behavior* of the courts in conflicts cases, that is, to the *results* that they reach in actual cases, it is clear that the courts which have abandoned the traditional approach indeed have been applying judicial method and the policy-centered conflict of laws.²⁶ They have rendered their decisions with reference to the fact-law pattern presented in the particular case, and as pointed out previously, at least in the torts area there is relative agreement among the courts as to how the choice of law issue should be resolved in each fact-law pattern. This agreement exists notwithstanding that different courts are purporting to be following different approaches to choice of law. In other words, the results in actual cases that arise are not likely to differ depending on which particular

23. As to the reasons why the law of the forum is the basic law, see B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 75-76 (1963); Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 19, at 87-95.

24. A court, of course, could adopt a particular approach to choice of law if it concludes that such an approach will best facilitate the operation of judicial method and the policy-centered conflict of laws.

25. See *infra* text at notes 58-69.

26. See Sedler, *Rules of Choice of Law*, *supra* note 2, at 1032.

"modern" approach²⁷ a court is purportedly applying or on whether a court even commits itself to a particular approach.²⁸ Moreover, there seems to be little dispute among the commentators that the courts are generally reaching functionally sound and fair results²⁹ in the cases coming before them for decision.³⁰ I submit the reason why they are reaching functionally sound and fair results is that they are employing judicial method and the policy-centered conflict of laws as the basis of the choice of law process.

I have previously reviewed the practice of the courts in conflicts torts cases and have demonstrated that what may be called tort *rules of choice of law* have emerged from that practice.³¹ These rules of choice of law are derived from the *results* reached by the courts in the torts cases coming before them, without regard to the particular approach to choice of law that they may purportedly be applying or the rationale for their decisions. In some fact-law patterns, the results are uniform. In others, the courts are divided, but these divisions can be stated in terms of majority and minority rules.³²

The most "universal" tort rule of choice of law, followed by all the courts that have abandoned the traditional approach, is that when two residents of the forum are involved in an accident in another state,

27. All of the "modern" approaches to choice of law involve to some degree considerations of policy and fairness to the parties.

28. Professor Leflar maintains that the courts "follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law." Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10, 10 (Spring 1977).

29. By a "functionally sound and fair result," I mean a result that is *acceptable* in the sense that it does not produce unfairness to the litigants in the particular case and does not require the application of the law of a state in circumstances in which the application of such law would be considered objectively unreasonable. Courts can disagree about the result in a particular conflicts case, as they can disagree about the result in any other case, and there could be more than one outcome in a particular conflicts case that would be considered to produce a functionally sound and fair result.

30. Again to quote Professor Leflar:

The fact is that most American courts today are moving to what they call "the" new law of conflict of laws. It is a conglomerate, and not a bad one. In terms of location, this body of law is being lifted up by the courts to a well-watered plateau high above the sinkhole it once occupied. No location lasts forever, and there are vistas beyond the plateau, but it is a rest-stop now.

Leflar, *supra* note 28, at 26.

The disagreement among academic commentators is over which approach to choice of law the courts should adopt, and the criticism tends to focus much more on the rationale of the courts' decisions than on the results of the decisions themselves. See, e.g., von Mehren, *supra* note 1.

31. Sedler, *Rules of Choice of Law*, *supra* note 2.

32. *Id.* at 1032.

the law of the forum applies.³³ Another rule of choice of law is that when two parties from a recovery state, without regard to forum residence, are involved in an accident in a non-recovery state, recovery is allowed.³⁴ One situation where the courts are divided is where two parties from a non-recovery state are involved in an accident in a recovery state, and suit is brought in the recovery state. The majority view here is that the forum should apply its own law allowing recovery.³⁵ Similarly, there have been a number of cases in which a recovery state plaintiff is injured by a non-recovery state defendant in the defendant's home state, but it is possible for the plaintiff's home state to exercise jurisdiction over the case,³⁶ and the plaintiff brings suit there. Here the majority of the courts have held that the forum should apply its own law allowing recovery.³⁷

The rules of choice of law that have emerged from the courts' decisions in conflicts torts cases illustrate the operation of judicial method and the policy-centered conflict of laws. While the courts have purportedly been employing different approaches to the resolution of choice of law issues, and while they sometimes have advanced different rationales for their conclusion, they have nonetheless reached substantially the same results. This, I submit, was due to the fact that in each case the courts were rendering the choice of law decision with reference to the fact-law pattern presented in that case and were basing that decision on considerations of policy and fairness to the parties. When later conflicts cases presenting different fact-law patterns

33. *Id.* at 1033-34.

34. *Id.* at 1034.

35. *Id.* at 1035.

36. Either because of sufficient contacts between the defendant and that state, such as when the defendant is "doing business" in that state, *see, e.g.*, *Schwartz v. Consol. Freightways Corp.*, 300 Minn. 487, 221 N.W.2d 665 (1974), or because of sufficient contacts between the transaction and the forum, such as where the trip giving rise to an accident in another state originated in the forum and was to end there, *see, e.g.*, *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972).

37. *Sedler, Rules of Choice of Law, supra* note 2, at 1036-37. This assumes, of course, that the application of the forum's law to the out-of-state defendant in the circumstances presented would not be fundamentally unfair. Ordinarily, in accident cases, the application of the law of a state other than that where the accident occurred will not be fundamentally unfair to the defendant, since the defendant did not "rely" on the law of the accident state before becoming involved in the accident. The application of the law of the state imposing liability in an accident case would be unfair to the defendant only when it was not foreseeable (and hence not insurable) that the defendant could incur such liability in the circumstances presented, or in the rare case when a party may have conformed its conduct to the requirements imposed by the law of a particular state and would not have expected to be held to the higher requirements imposed by the law of another state. Since every state requires that automobile liability insurance policies must cover the insured driver for accidents occurring in every state, the application of any state's law in an automobile accident case could not be fundamentally unfair to the driver or the insurer. *See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS* 271-73 (2d ed. 1980).

arose in the same state, the courts built on their earlier decisions and looked to the rationale of those decisions in deciding how to resolve the choice of law issue now presented. Therefore, in each state that has abandoned the traditional approach, there has emerged a "law" of the conflict of laws, based on the courts' decisions in actual cases, and resulting from the normal workings of binding precedent and stare decisis.

I have emphasized that the results did not differ depending on which "modern" approach to choice of law the courts were purportedly following. However, the results reached by the courts in these cases are generally consistent with the interest analysis approach developed by the late Brainerd Currie and refined by myself and Currie's other adherents.³⁸ I maintain that in practice the courts that have abandoned the traditional approach generally apply interest analysis to resolve choice of law problems regardless of which "modern" approach they are purportedly following. I further submit that interest analysis is the preferred approach to choice of law because it facilitates the court's task of reaching a functionally sound and fair result in the case before it. It does so because it is based on what in practice seems to the courts to be the most rational consideration in making choice of law decisions: the policies reflected in a state's rule of substantive law and a state's interest in applying its law to implement those policies in a particular case.³⁹

Nonetheless, the focus in the present article is on the choice of law *process* rather than on the preferred *approach* to choice of law. If the courts are in practice applying interest analysis, it is because the courts have concluded that this approach facilitates their task in achieving functionally sound and fair results in particular cases. Their primary concern, however, has been with the choice of law *result* in the cases coming before them for decision and not with the matter of the preferred approach to choice of law. Thus, they have followed judicial method and the policy-centered conflict of laws in the resolution of conflicts problems. And this, I maintain, is why they have generally reached functionally sound and fair results in the cases coming before them for decision.

II. THE SEXTON-STORIE DECISION

In *Sexton-Storie*, the Michigan Supreme Court again came to grips with the fundamental question of whether it was going to con-

38. Currie's writings are collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). For the author's reformulation of Currie's interest analysis approach for use by the courts in the day-to-day process of deciding actual cases, see Sedler, *Governmental Interest Approach*, *supra* note 1, at 220-36. See also Kay, *supra* note 1.

39. Sedler, *Interest Analysis and Forum Preference*, *supra* note 1, at 43-44.

tinue to follow the traditional approach to choice of law in the context of conflicts torts cases. It had dealt with that question during what may be called the "first round of the choice of law revolution,"⁴⁰ and had opted in favor of adherence to the traditional approach. In *Abendschein v. Farrell*,⁴¹ decided in 1969, the court concluded that "the quagmire of unanswered and perceivably unanswerable questions arising out of the proposed new doctrine appears less attractive than our admittedly hard and fast—and occasionally unjust, it is true—rule that the law of the place of the wrong is applied when the forum is a Michigan court."⁴²

In the years following *Abendschein*, much happened in regard to choice of law, not only in the ever-increasing number of states that had abandoned the traditional approach,⁴³ but in Michigan as well. My research disclosed that: "The place of the wrong rule simply has not been followed consistently by the Michigan Court of Appeals and by the federal courts in Michigan called upon to apply Michigan conflicts law in diversity cases."⁴⁴ Quite to the contrary, these courts, when they were disposed to do so,⁴⁵ employed all of the classic "escape devices" and "manipulative techniques"⁴⁶ in order to avoid the operation of the place of the wrong rule and to bring about the application of Michigan law.⁴⁷ I concluded that, "[i]n practice, the place of the

40. The "first round of the choice of law revolution" began with *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), and in the wake of *Babcock*, a number of courts abandoned the traditional approach. The "second round of the choice of law revolution" is reflected in the more recent cases, where courts that had refused to abandon the traditional approach at an earlier time, have now done so. See *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977); *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980); *Pevoski v. Pevoski*, 371 Mass. 358, 358 N.E.2d 416 (1976); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979). With the *Sexton-Storie* decision, Michigan becomes the latest state to "go modern."

41. 382 Mich. 510, 170 N.W.2d 137 (1969).

42. *Id.* at 516, 170 N.W.2d at 139. For a discussion of the reasons why *Abendschein* may have appeared to the Michigan Supreme Court to be a difficult case at the time it arose, see Sedler, *Choice of Law in Michigan*, *supra* note 8, at 829-30.

43. See *supra* note 14.

44. Sedler, *Choice of Law in Michigan*, *supra* note 8, at 839.

45. The disposition of the Michigan Court of Appeals to avoid the operation of the place of the wrong rule depended in large part on the composition of the particular panel deciding the case. Likewise, some federal judges were disposed to avoid the rule while others were not.

46. For a review of the classic "escape devices" and "manipulative techniques" see Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 19, at 48-53.

47. See the discussion in Sedler, *Choice of Law in Michigan*, *supra* note 8, at 843-47. Some of these cases involved the application of the Michigan borrowing statute rather than a choice of law question. The borrowing statute, as it then stood, provided that a suit not barred by limitations under Michigan law could be barred by the shorter statute of limitations of the "place where the claim accrued." MICH. COMP.

wrong rule has been honored more in the breach than in the observance,"⁴⁸ and that because of the necessarily unpredictable behavior of the courts, "[c]hoice of law in Michigan is in a shambles."⁴⁹ I contended that:

These developments should persuade the Michigan Supreme Court to abandon the place of the wrong rule and the traditional approach to choice of law that it embodies. It is now time for Michigan to embrace the policy-centered approach to choice of law, with its emphasis on considerations of policy and fairness to the parties and on the real interests of the involved states.⁵⁰

My research into the conflict cases that actually arose in Michigan after 1969 also disclosed another very important point. Of the nine cases arising in the Michigan Court of Appeals and the federal courts in Michigan since *Abendschein*,⁵¹ seven involved the identical fact-law

LAWS ANN. § 600.5861(2) (1968) (repealed 1978). Since Michigan followed the place of the wrong rule, the "place where the claim accrued" meant the state where the accident occurred. *Parish v. B.F. Goodrich Co.*, 395 Mich. 271, 235 N.W.2d 570 (1975). When it was disposed to do so, the Michigan Court of Appeals tinkered with the borrowing statute in order to circumvent the time-barring effect of the law of the state where the accident occurred. See Sedler, *Choice of Law in Michigan*, *supra* note 8, at 845-46. The borrowing statute was subsequently amended so as to be inapplicable when the plaintiff was a Michigan resident. MICH. COMP. LAWS ANN. § 600.5861 (Supp. 1981).

48. Sedler, *Choice of Law in Michigan*, *supra* note 8, at 840.

49. *Id.* at 847. In *Sweeney v. Sweeney*, 402 Mich. 234, 262 N.W.2d 625 (1978), the Michigan Supreme Court held that Michigan's "public policy" dictated that Michigan law apply on the issue of spousal immunity in an Ohio accident involving Michigan parties. While the court seemingly took pains to make it clear that it was not using "public policy" as a "manipulative technique," the court specifically refused to abandon the place of the wrong rule in that case. See the discussion in Sedler, *Choice of Law in Michigan*, *supra* note 8, at 853-55.

50. Sedler, *Choice of Law in Michigan*, *supra* note 8, at 832. My use of the term "policy-centered approach" in that writing and other earlier writings was intended to refer to a choice of law process based on judicial method and the policy-centered conflict of laws rather than to a particular approach to the resolution of choice of law issues. In the present writing, I am for the first time distinguishing precisely between the choice of law process and the approaches to the resolution of choice of law issues. Thus, for the sake of clarity, I will no longer be using the term, "policy-centered approach."

51. This includes both the choice of law cases and the borrowing statute cases. The same fact-law pattern was involved in a case decided by the Michigan Court of Appeals subsequent to the publication of the article, *Shaheen v. Schoenberger*, 92 Mich. App. 491, 285 N.W.2d 343 (1979). In *Shaheen*, Michigan parties were involved in an accident in Florida, whose law limited the amount of damages recoverable, while Michigan law did not. Relying on the Michigan Supreme Court's decision in *Sweeney*, the court of appeals in *Shaheen* held that Michigan's "public policy" exempted the elements of damages recoverable from the place of the wrong rule. *Id.* at 494, 285 N.W.2d at 344.

pattern, which was also the fact-law pattern in *Sexton-Storie*: the plaintiff and defendant were residents of Michigan and were involved in an accident in another state; under Michigan law, the plaintiffs were entitled to recover; but if the law of the accident state applied, recovery would be denied.

This fact-law pattern involves what is the most "universal" rule of choice of law: when two residents of the forum are involved in an accident in another state, the forum will apply its own law.⁵² The resulting rule of choice of law embodies the interest solution that where the forum has a real interest in applying its own law, it should do so.⁵³ Thus, where the law of the forum allows recovery, as in Michigan, and the law of the accident state does not, the classic false conflict is presented: the parties' home state has a real interest in applying its law in order to implement the policy reflected in that law, while the policy reflected in the law of the accident state denying recovery will not be advanced by its application in the particular case.⁵⁴ Ever since the seminal case of *Babcock v. Jackson*,⁵⁵ this fact-law pattern most frequently has furnished the occasion for the courts to abandon the place of the wrong rule and the traditional approach to choice of law that it embodies.⁵⁶

Since this was the fact-law pattern presented in *Sexton-Storie*, and was the *typical* fact-law pattern presented in conflicts torts cases in Michigan, all the Michigan Supreme Court had to do in *Sexton-Storie* was to decide whether Michigan law should be applied or displaced in *this fact-law pattern*. It was not necessary for the court, in order to render a decision, to adopt any particular approach to the resolution of choice of law issues or to adopt an approach to choice of law at all. All it had to do was to render a choice of law decision with respect to the fact-law pattern presented and its decision would resolve the great majority of conflicts torts cases that had arisen in Michigan.

This is exactly what the Michigan Supreme Court did. It decided the case solely with reference to the fact-law pattern presented, and it based its decision on considerations of policy and fairness to the parties. Its holding was that where the parties to an accident in another state are Michigan residents or corporations doing business in Michigan, Michigan law applies. As Chief Justice Williams emphasized in his opinion, the decision was rendered "in the normal common-law tradition,"⁵⁷ and was limited to the fact-law pattern presented in

52. Sedler, *Rules of Choice of Law*, *supra* note 2, at 1033-34.

53. Sedler, *Governmental Interest Approach*, *supra* note 1, at 227-30.

54. *Id.* at 186-87.

55. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 748 (1963).

56. See the discussion of this point in Sedler, *Choice of Law in Michigan*, *supra* note 8, at 830-32.

57. 413 Mich. at 433, 320 N.W.2d at 854.

that case. The Chief Justice specifically refused to adopt any particular approach to choice of law, and indicated that the court would decide how other choice of law issues should be resolved only when those issues arose in an actual case.⁵⁸

However, in the course of his opinion, the Chief Justice set forth three major reasons for holding that Michigan law applied in this fact-law pattern, and these reasons should serve as a guide to the resolution of the choice of law issue in a case presenting a different fact-law pattern. First, in rejecting the argument that the law of the place of the wrong should be applied in the *Sexton-Storie* fact-law pattern on the ground that the place of the wrong rule avoids "forum shopping," the Chief Justice noted:

[T]he forum state generally has an interest in seeing that its injured citizens are well-served and that its citizen defendants are afforded every protection that such citizens would have in their own state. Additionally, where both the plaintiff and the defendant are citizens of the forum state, the state where the wrong took place will normally have no interest in the litigation.⁵⁹

Second, in discussing the cases where the Michigan courts had refused to apply the place of the wrong rule on "public policy" grounds,⁶⁰ he contended that they stood for the proposition that any legislative

58. *Id.*

59. *Id.* Where both the plaintiff and the defendant are Michigan residents, Michigan is clearly an appropriate forum for the suit. As the Chief Justice observed: "[A]voidance of forum shopping . . . is not a strong argument as against citizens of the forum state who presumably have every reason of convenience and economy to be entitled to service in their own state." *Id.* at 433, 320 N.W.2d at 854.

60. *Sweeney v. Sweeney*, 402 Mich. 234, 262 N.W.2d 625 (1978); *Shaheen v. Shoenberger*, 92 Mich. App. 491, 285 N.W.2d 343 (1979); *Branyan v. Alpena Flying Serv.*, 65 Mich. App. 1, 236 N.W.2d 739 (1975) (where Michigan residents flying in an aircraft owned by a Michigan corporation were killed in an air crash in Virginia, Michigan's "public policy" precluded limiting the damages recoverable for wrongful death under Virginia law). The court in *Sexton-Storie* also discussed its decision in *Lieberthal v. Glens Falls Indem. Co.*, 316 Mich. 37, 24 N.W.2d 547 (1946), where, in the process of holding that a Michigan statute prohibiting a direct action against an insurer applied to a suit arising out of an accident in another state, it defined "public policy" simply in terms of the state's law. As the court in *Lieberthal* stated: "Public policy of a state is fixed by its Constitution, its statutory law, and the decisions of its courts; and when the Legislature enacts a law within the limits of the Constitution; the enactment insofar as it bears upon the matter of public policy is conclusive." *Id.* at 40, 26 N.W.2d at 549. What the court did in *Lieberthal* was simply to equate "public policy" with "substantive law." This is another way of saying that when a forum has a real interest in applying its own law in order to implement the policy reflected in that law, it should do so. See the discussion of this point in Sedler, *Choice of Law in Michigan*, *supra* note 8, at 854-55.

enactment was "a sufficient public policy" to transfer choice of law to Michigan in cases where Michigan residents were involved.⁶¹ Finally, he noted that the fact-law pattern presented in *Sexton-Storie* cited the "universal" rule of choice law that the law of the forum applies.⁶²

Justices Moody and Levin joined in the Chief Justice's opinion. Justice Kavanagh wrote a brief concurring opinion, joined by Justice Fitzgerald and also by Justice Levin, which emphasized that the Michigan owners' liability statutes should be applicable to accidents occurring in other states where the parties were Michigan residents.⁶³ According to Justice Levin, the thrust of the Kavanagh opinion, with which he agreed, was that in future conflicts torts cases coming before the Michigan courts, Michigan law should apply absent a "compelling" reason for applying the law of another state, and the mere fact that the accident occurred in another state was not a good reason for displacing Michigan law.⁶⁴

61. 413 Mich. at 431, 320 N.W.2d at 853. As noted above, this means that Michigan law will apply whenever the application of Michigan law will advance the policy reflected in that law.

62. *Id.* at 427, 320 N.W.2d at 851.

63. *Id.* at 440-41, 320 N.W.2d at 857.

64. *Id.* at 442, 320 N.W.2d at 858. Justice Ryan and then Chief Justice Coleman dissented, contending that Michigan should continue to adhere to the "place of the wrong" rule. *Id.* at 443, 320 N.W.2d at 858.

In *Sexton-Storie*, the court also considered the contention that the Michigan law should not apply to the instant cases on the ground that the Michigan owners' liability statutes did not have "extra-territorial application." The court held that the application of the owners' liability statutes in the circumstances of those cases did not "result in an extraterritorial application of Michigan law." *Id.* at 436, 320 N.W.2d at 855. The reasoning here was that the legislature was not regulating the tortious conduct of the operators of the vehicles, but rather was regulating the relationship between the owner and the operator. Since the relationship between the owner and the operator was formed in Michigan, there was no extraterritorial application of Michigan law in imposing statutory liability for an accident arising out of that relationship. *Id.* at 436-37, 320 N.W.2d at 855-56.

The matter of the application of a Michigan statute to an accident involving Michigan parties in another state requires some further consideration. Historically, there was a presumption against extraterritorial application of statutes. This presumption reflected judicial acceptance of the territoriality principle as the basis of American conflicts law, and that acceptance also underlies the territorially-based rules of the traditional approach. See the discussion of this point in Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 19, at 33-41.

Analytically, the presumption against extraterritorial application of statutes is related to legislative directives as to a statute's applicability, which, of course, are binding on the courts of the enacting state. When the legislature has specifically provided that a statute shall be applicable to a particular situation containing a foreign element, the statute must be applied to that situation by the courts of the enacting state, totally apart from choice-of-law considerations, assuming that the application of the statute to that situation is constitutional. Conversely, when the legislature has specifically provided that the statute shall not be applied to a particular situation con-

taining a foreign element, it cannot be applied to that situation by the courts of the enacting state and will not be applied to that situation by the courts of any other state. For the most part, however, legislatures have not tried to specify the situations containing a foreign element to which a statute does or does not apply. An exception in this regard is found in the modern "no fault" acts, such as MICH. COMP. LAWS ANN. § 500.3111 (1983), which does specify the act's application to particular situations containing a foreign element.

Even where the legislature has not expressly specified the application or non-application of a statute to a situation containing a foreign element, it may be determined that, as a matter of demonstrable legislative intention, the statute was or was not to apply to such situations. Where the intention of the legislature was that the statute not apply to a particular situation containing a foreign element, the statute constitutes what is called a functionally restrictive substantive rule. It cannot be applied to that situation by the courts of the enacting state and will not be applied to that situation by the courts of the state where the events occurred. On the subject generally, see Sedler, *Functionally Restrictive Substantive Rules in American Conflicts Law*, 50 S. CAL. L. REV. 27 (1976).

This is where the historical presumption against extraterritorial application of statutes comes into play. In states that recognize that presumption, the presumed intention of the legislature is that the statute not apply extraterritorially to events occurring outside of the enacting state. That presumption can be rebutted only by an express directive that the statute apply to certain situations occurring outside of the enacting state or by clear evidence of legislative intention that it so apply. In the absence of such directive or evidence, the statute will not be applicable. See, e.g., *Graham v. General U.S. Grant Post*, 43 Ill. 2d 1, 248 N.E.2d 657 (1969) (Illinois Dram Shop Act did not apply where service of liquor to intoxicated patron by tavern in Illinois caused accident in Wisconsin injuring Illinois resident); *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968) (Texas Wrongful Death Act did not apply to fatal aircraft crash involving Texas residents and Texas aircraft owner that occurred in Colorado).

The presumption against extraterritorial application of statutes is not a very realistic one today. As Chief Justice Williams noted in *Sexton-Storie*:

As populations and technology progressed and travel between countries and among the states increased to an everyday occurrence, exceptions to the general rule of extraterritoriality were created so that it is now recognized that "a state may have the power to legislate concerning the rights and obligations of its citizens with regard to transactions occurring beyond its boundaries."

413 Mich. at 434, 320 N.W.2d at 854 (citations omitted). He went on to point out that in order to achieve the legislative purpose of the owners' liability statutes, they must be given uniform application, since to enforce the statute on the basis of where the accident occurred would undermine the effectiveness of the statutes. *Id.* at 437-38, 320 N.W.2d at 856.

At this juncture, the Chief Justice related the matter of extraterritorial application of the owners' liability statutes to the choice of law holding. Since Michigan law applied whenever Michigan parties were involved in an accident in another state:

[It would be] anomalous if the injured Michigan party, who could sue the Michigan driver who was negligent in another state in a Michigan court under Michigan law, could not sue the Michigan owner whose obligation to the injured Michigan party arose out of his entrusting his car in Michigan to a Michigan driver who subsequently injured a Michigan person in that car.

Id. at 438, 320 N.W.2d at 856. Therefore, the Chief Justice concluded that even if the owners' liability statutes were being given extraterritorial effect when the owner-

Let me now relate the holding in *Sexton-Storie* and the rationale of the Williams and the Kavanagh-Levin opinions to judicial method and the policy-centered conflict of laws. It is my submission that the holding in *Sexton-Storie* and the rationale of both opinions show that Michigan has adopted judicial method and the policy-centered conflict of laws as the basis of the choice of law process. The first premise of judicial method and the policy-centered conflict of laws is that the basic law is the law of the forum, which will be applied in the absence of valid reasons for its displacement. That premise is specifically recognized in the Kavanagh-Levin rationale: in conflicts torts cases before the Michigan courts, Michigan law should apply absent a "compelling" reason for applying the law of another state. I do not think that Chief Justice Williams would disagree with that premise, and therefore we may assume that it is incorporated into the choice of law process in Michigan.

The second premise is that the choice of law decision will be made with reference to the fact-law pattern presented in the particular case. This premise was specifically recognized in the Williams rationale. The Chief Justice emphasized that the decision was rendered "in the normal common law tradition" and that it was not intended to go beyond the fact-law pattern presented in that case. While the Kavanagh-Levin rationale went somewhat beyond what was absolutely necessary for the holding in *Sexton-Storie*, and tried to establish guidelines for choice of law decisions in other conflicts torts cases, Justice Levin emphasized that the court should not attempt to "prognosticate [the] disposition" of questions in other areas of law.⁶⁵ The Kavanagh-Levin rationale did not propose a particular approach to the resolution of choice of law issues, and under that rationale, choice of law decisions will still have to be made on a case-by-case basis.

The third premise is that the choice of law decision should be based on considerations of policy and fairness to the parties. This premise is supported clearly in both the Williams and the Kavanagh-Levin rationales. Both rationales focused on the policy reflected in Michigan law, on the interest of Michigan in applying its law when Michigan parties were involved in an out-of-state accident, and on the corresponding absence of any interest on the part of the accident state in applying its law in such a situation. Justice Levin noted that the

operator relationship arose in Michigan, it would be proper for them to be applied extraterritorially. *Id.* at 439, 320 N.W.2d at 856.

It seems clear, in light of the holding and rationale of *Sexton-Storie*, that the presumption against extraterritorial application of statutes should no longer operate in Michigan, and that when the otherwise applicable rule of Michigan law is contained in a statute, the statute will be applied to events occurring in another state unless the contrary intention of the legislature is most clearly manifested.

65. *Id.* at 442, 320 N.W.2d at 858.

mere fact that an accident occurred in a particular state was not a sufficient reason for applying the law of that state.⁶⁶ Both rationales looked to considerations of policy, reflecting the interests of the involved states in having their law applied on the point in issue, and not to the factual contacts that the transaction may have had with a particular state.⁶⁷ It is reasonable to conclude, therefore, in light of the holding in *Sexton-Storie*, and the rationale of the Williams and Kavanagh-Levin opinions, that future choice of law decisions in Michigan will be based on considerations of policy and fairness to the parties. For the above reasons, it is submitted that Michigan now has adopted judicial method and the policy-centered conflict of laws as the basis of the choice of law process.

Neither the Williams nor the Kavanagh-Levin opinion adopted a particular approach to the resolution of the choice of law issue, a point that the Chief Justice specifically emphasized. The rationale of the opinions, however, focuses on the *interest* of Michigan in applying its law in order to implement the policy reflected in that law when Michigan parties are involved in an accident in another state. As I have demonstrated elsewhere, in practice the courts that have abandoned the traditional approach to choice of law generally employ interest analysis to resolve choice of law problems regardless of which "modern" approach to choice of law they are purportedly following.⁶⁸ So, when a court adopts judicial method and the policy-centered conflict of laws as the basis of the choice of law process, it can be assumed that the interest analysis approach will play a very important part in that court's resolution of choice of law issues.

This is a very important point in regard to the relationship between the choice of law *process* and *approaches* to choice of law. When a court adopts judicial method and the policy-centered conflict of laws as the basis of the choice of law process, it need not adopt any particular approach to the resolution of choice of law issues. But since the criteria for the choice of law decision under that process are considerations of policy and fairness to the parties, the court inevitably will take account of the policies reflected in the laws of the involved states as well as the interest of each state, in light of those policies, in having its law applied in the particular case. This is because the interest of a state in having its law applied in order to implement the policy reflected in that law seems to the courts to be the most rational consideration in making choice of law decisions. So, while a court may

66. *Id.*

67. There was, of course, no question that the application of Michigan law in *Sexton-Storie* was fair to the parties. As a practical matter, questions of fairness to the parties generally do not arise in conflicts torts cases. See *supra* note 37.

68. See the discussion of this point in Sedler, *Governmental Interest Approach*, *supra* note 1, at 227-33.

not specifically adopt the interest analysis approach to choice of law, and while it may in fact adopt a different "modern" approach to choice of law, experience indicates that the *results* reached by the courts in the cases coming before them for decision are generally consistent with the interest analysis approach.⁶⁹ Thus, whenever a court commits itself to judicial method and the policy-centered conflict of laws as the basis of the choice of law process, its decisions in actual cases are likely to be based to a substantial extent on a consideration of the policies reflected in the laws of the involved states, and the interests of each state, in light of those policies, in having its law applied in the particular case.

Now that Michigan is committed to judicial method and the policy-centered conflict of laws as the basis of the choice of law process, we would likewise expect the choice of law result in a particular case to be consistent with interest analysis. In the absence of contrary indications by the Michigan Supreme Court, therefore, we may assume that the primary factor in the choice of law decision will be the court's evaluation of the policies reflected in the laws of the involved states, and the interest of each state, in light of those policies, in having its law applied in the particular case.

A few years back, I undertook a reformulation of the interest analysis approach, as originally developed by the late Brainerd Currie, for the purpose of facilitating its use by the courts in the process of deciding actual cases.⁷⁰ This reformulation focuses on the *real interests* of the forum and the other involved state,⁷¹ and establishes three interest situations and solutions. First, when the forum has a real interest in applying its own law on the point in issue, it should do so, assuming that this will not be fundamentally unfair to the other party.⁷² Second, where the forum does not have a real interest in applying its own law on the point in issue, but another state has such an interest, it should apply the law of the other state, again assuming no fundamental unfairness.⁷³ Third, when neither state has a real interest in applying its law on the point in issue, the choice of law decision should be made with reference to the common policies reflected in the

69. It is also true that when the forum has a real interest in applying its own law in order to implement the policy reflected in that law, it will generally do so, as Currie and Ives advocate. *Id.* at 227-33.

70. *Id.* at 220-36.

71. In determining whether a state has a real interest in the application of its law on the point in issue, the inquiry is whether the policy behind the state's rule of law will be significantly advanced by its application to the particular situation containing a foreign element. For a discussion of determining real interests, see *id.* at 222-27.

72. This covers what Currie calls the true conflict and the false conflict where the forum is the only interested state. See *id.* at 186-87, 188-89.

73. This covers the false conflict where the forum is the disinterested state.

other laws of the involved states.⁷⁴ These interest solutions are to a large extent embodied in the tort rules of choice of law that have emerged from the courts' decisions in actual cases.⁷⁵

How the Michigan courts will resolve cases presenting these different interest situations can only be determined when such cases actually arise. The fact-law pattern presented in *Sexton-Storie* only involved one aspect of the first interest situation: the case where Michigan had a real interest in having its law applied, and the other involved state did not. My solution to the first interest situation, however, also covers the "true conflict" case, where both Michigan and the other involved state have a real interest in having their law applied in the particular case. This point illustrates the difference between a court's adopting a particular approach to choice of law, such as interest analysis, as opposed to a court's adopting judicial method and the policy-centered conflict of laws as the basis of the choice of law process without at the same time adopting any particular approach to choice of law. In *Sexton-Storie*, the court held only that Michigan law would apply in the fact-law pattern presented in that case and did not, by adopting a particular approach to choice of law, try to control the result in a case that had not yet arisen.⁷⁶

To sum up, in *Sexton-Storie*, the Michigan Supreme Court adopted judicial method and the policy-centered conflict of laws as the basis of the choice of law process in Michigan. It did not adopt any particular approach to choice of law, although as pointed out above, experience indicates that whenever a court adopts judicial method and the policy-centered conflict of laws as the basis of the choice of law process, the interest analysis approach will play a very important part in the court's resolution of choice of law issues. The rationale for the holding in *Sexton-Storie*, as contained in both the Williams and Kavanagh-Levin opinions, illustrates judicial reliance on interest analysis to resolve choice of law questions. The decision in *Sexton-Storie*, however, was limited to the fact-law pattern presented in that case, and the holding is simply that Michigan law applies whenever two Michigan parties are involved in an accident in another state. The question of what law will be applicable in other fact-law patterns will only be decided as cases involving those fact-law patterns actually

74. This covers the unprovided-for case. For a discussion of the common policy rationale for the resolution of the unprovided-for case, see *id.* at 233-36. See also the discussion in Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 137-42 (1973).

75. As illustrated by the rules of choice of law themselves. See Sedler, *Rules of Choice of Law*, *supra* note 2, at 1032-41.

76. For a discussion of the experience of New York, which has tried to "govern" choice of law in interstate accident cases by the promulgation of narrow, policy-based rules, see *id.* at 983-94.

arise. This is as it should be under judicial method and the policy-centered conflict of laws.

III. THE DEVELOPMENT OF CHOICE OF LAW IN CONFLICTS TORTS CASES IN MICHIGAN

We will now consider some other fact-law patterns that have been presented in other conflicts torts cases and try to predict how they would be decided by the Michigan Supreme Court today. In accordance with judicial method, we will do so in light of the holding in *Sexton-Storie* and the rationale of the Williams and Kavanagh-Levin opinions. Looking to the fact-law patterns presented in cases previously arising in Michigan, let us first reconsider *Abendschein v. Farrell*.⁷⁷ Under the particular facts of that case, both New York (the plaintiff's home state) and Michigan (the defendant's home state) would allow recovery—New York, because it did not have a guest statute, and Michigan, because the defendant assumedly was guilty of gross negligence and so would still be liable under the then-extant Michigan guest statute.⁷⁸ Ontario, where the accident occurred, would have no interest in applying its guest statute to enable a Michigan defendant to avoid liability to a New York plaintiff. Thus, there was no conflict between Michigan law and New York law on the point in issue, and New York had a real interest in applying its law to allow recovery.

In terms of interest analysis, the case presents a false conflict. The rule of choice of law in such a situation is that whenever two parties from recovery states, without regard to forum residence, are involved in an accident in a nonrecovery state, recovery will be allowed.⁷⁹ Functionally, this case is no different from *Sexton-Storie*, since recovery is allowed by the law of the parties' home states, and the accident state has no interest in having its law applied to deny recovery. *Sexton-Storie* would control the result in *Abendschein*, and recovery would be allowed.

Now let us consider the situation where the plaintiff is from Michigan, the law of which allows recovery, the defendant is from a nonrecovery state, and the accident occurs in the defendant's home state. Suit is brought in Michigan, where jurisdiction can be exercised on the basis of the defendant's contacts with this state. This situation was presented in *Papizzo v. O. Robertson Transport, Ltd.*,⁸⁰ where a

77. 382 Mich. 510, 170 N.W.2d 137 (1969).

78. See Sedler, *Choice of Law in Michigan*, *supra* note 8, at 836.

79. See Sedler, *Rules of Choice of Law*, *supra* note 2, at 1034. The result is the same whenever parties from the same recovery state are involved in an accident in a non-recovery state, and suit is brought in the non-recovery state. See, e.g., *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968).

80. 401 F. Supp. 540 (E.D. Mich. 1975).

Michigan victim was killed in Ontario due to the negligence of an Ontario defendant, which was doing business in Michigan. Under Michigan law, recovery was allowed in a wrongful death action for various intangible interests, such as loss of companionship; under Ontario law it was not. The Michigan federal court used the manipulative technique of "procedural characterization" to apply Michigan law as the "law of the forum" on this issue. In so doing, it emphasized Michigan's interest in applying its law allowing greater recovery and the absence of unfairness to the defendant in the application of Michigan law on this issue.⁸¹

In terms of interest analysis, this fact-law pattern presents what Currie calls the true conflict, or as I would put it, the situation where both of the involved states have a real interest in having their law applied on the point in issue. Michigan has a real interest in applying its law to allow full recovery to the beneficiaries of a Michigan decedent, while Ontario has a real interest in having its law applied to limit the liability of an Ontario defendant.⁸² In such a situation, Currie and I maintain that the forum should apply its own law to implement its own policies and interests.⁸³ There is obviously no unfairness to the Ontario defendant in the application of Michigan law on this issue, since the defendant did not "rely" on Ontario law limiting the elements of damages recoverable for wrongful death before becoming involved in the fatal accident. Where a plaintiff from a recovery state is injured or killed by a defendant from a nonrecovery state in the defendant's home state, and suit can be brought in the plaintiff's home state, the majority of the courts passing on the question have held that the forum should apply its own law allowing recovery.⁸⁴

Michigan law clearly would be applicable here under the rationale of the Kavanagh-Levin opinion in *Sexton-Storie*. It was this kind of case to which Justice Levin presumably was referring when he stated that Michigan law should apply in all personal injury and property damage cases in Michigan, "without regard to whether the plaintiffs and defendants are all Michigan persons unless there is compelling reason for applying the law of some other jurisdiction."⁸⁵ Since

81. *Id.* at 543.

82. In the accident situation, the real interests lie in the parties' home states, because the consequences of the accident and of allowing or denying liability will be felt by the parties in the home state. The interest calculus thus is not affected by the place where the accident occurs.

83. See the discussion in Sedler, *Governmental Interest Approach*, *supra* note 1, at 227-30.

84. Sedler, *Rules of Choice of Law*, *supra* note 2, at 1036-37.

85. 413 Mich. at 442, 320 N.W.2d at 858. Justice Levin apparently takes the position that where the defendant does business in Michigan, the defendant is a Michigan "resident" for choice of law purposes, and says that where the defendant is a Michigan resident, "ordinarily there will be insufficient reason for applying the law of

Michigan has a real interest in applying its law here in order to implement the policy reflected in that law, there most certainly would not be a "compelling reason" for applying Ontario law,⁸⁶ and it seems clear that Michigan law would be applicable under the Kavanagh-Levin rationale.

I also think that Michigan law would be applicable here under the Williams rationale. The Chief Justice emphasized Michigan's interest in applying its law on the point in issue in *Sexton-Storie* and its concern for advancing Michigan's policy in conflicts cases, as illustrated by the cases where the courts had refused to apply the place of the wrong rule on "public policy" grounds.⁸⁷ Those reasons indicate that whenever Michigan has a real interest in having its law applied in order to implement the policy reflected in its law, Michigan law should apply, notwithstanding that another state may also have a real interest. Should a case like *Papizzo* or any other "true conflict" case arise in Michigan, I think it is highly likely that the Michigan Supreme Court would hold that Michigan law should apply.⁸⁸

Now let us consider the "reverse *Sexton-Storie*" situation. Two

another state." *Id.* at 441, 320 N.W.2d at 857. However, where the defendant is incorporated or has its principal place of business in another state, that state would be interested in applying its law to shield that defendant from liability. This case, therefore, is not identical to *Sexton-Storie*. My submission is that since Michigan's interest is the same in both cases, Michigan should apply its own law notwithstanding the existence of an interest in another state in the latter case. See Sedler, *Governmental Interest Approach*, *supra* note 1, at 227-30.

A case presenting this fact-law pattern could also arise in Michigan even where the defendant had no connection with Michigan. This would occur where the transaction giving rise to the accident was factually connected with Michigan, so as to make it constitutionally permissible for Michigan to exercise jurisdiction on the basis of forum-transaction contacts. Suppose that an Ontario driver comes to Michigan, takes a Michigan passenger on a trip to Ontario, intending to return to Michigan that evening, and an accident occurs while the parties are traveling in Ontario. Because of the factual contacts that the transaction giving rise to the accident had with Michigan, Michigan could constitutionally exercise jurisdiction on the basis of forum-transaction contacts regardless of whether the accident itself occurred in Ontario or Michigan. In the event that the defendant asserted the Ontario guest statute to bar recovery, a true conflict would be presented, and again, I would submit that Michigan should apply its own law. See *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972).

86. As Currie has observed:

The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. It should apply its own law . . . simply because a court should never apply any other law except when there is a good reason for doing so. That so doing will promote the interests of a foreign state at the expense of the interests of the forum state is not a good reason.

B. CURRIE, *supra* note 38, at 119.

87. *Papizzo* fits into this category. See *supra* note 60.

88. For the above reasons, lower state courts and Michigan federal courts should so hold if and when they are presented with such a case.

residents of Ontario, traveling in the same automobile in Michigan, are involved in an accident in Michigan. Suit is brought in Michigan under the tort long-arm act, and the defendant asserts the defense of guest statute immunity in accordance with Ontario law.⁸⁹ Ontario, of course, has a real interest in applying its law on this issue, since the defendant is an Ontario resident, and the accident will be charged to the insurer's Ontario loss experience. Here, because the accident occurred in Michigan, Michigan could assert a general interest in applying its law to allow recovery: the plaintiff might become a public charge in Michigan if recovery is not permitted or may have incurred debts to resident medical creditors which could only be satisfied from the proceeds of tort recovery.⁹⁰ It has also been contended that the compensatory policy of the state of injury should be applied in favor of all persons injured within its borders.⁹¹

In my view, this general interest in allowing recovery is quite insubstantial, and cannot justify the application of the law of the accident state to defeat the strong defendant-protecting policy reflected in the law of the parties' home state. In this day and age, the accident victim will get back home, and the social and economic consequences of the accident and of imposing or denying liability will be felt by the parties in the home state. The purpose of tort recovery is not to provide reimbursement for medical creditors, since medical loss forms such a small part of the total recovery. The only real interest here lies with the parties' home state, Ontario, and its law should be applied to deny recovery.⁹² In this fact-law pattern, the courts are divided, but the majority view is that the forum should apply its own law allowing recovery.⁹³ I strongly disagree with this view and maintain that it simply reflects the forum's preference for what it considers to be its own "better law."⁹⁴

89. The Ontario plaintiff would not sue in Ontario, because if suit had been brought there, Ontario would apply its own law and deny recovery. The Canadian courts follow the "English rule" in tort cases, under which tort liability cannot be imposed if it would not be imposed under the law of the forum. See *McLean v. Pettigrew*, [1945] 2 D.L.R. 65. In this country, whenever non-recovery state parties are involved in an accident in a recovery state, and suit is brought in the parties' home state, assuming that state has abandoned the traditional approach, it will apply its own law and deny recovery. See, e.g., *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *DeFoor v. Lematta*, 249 Or. 116, 437 P.2d 107 (1968). This being so, the plaintiff will always bring suit in the accident state, obtaining jurisdiction under its long-arm act.

90. See B. CURRIE, *supra* note 38, at 366-72.

91. See D. CAVERS, *supra* note 5, at 143-45.

92. See the discussion in Sedler, *Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents*, *supra* note 19, at 382-83.

93. Sedler, *Rules of Choice of Law*, *supra* note 2, at 1035.

94. In some of these cases, the "better law" rationale has been specifically advanced for the application of the forum's own law allowing recovery. See *Gagne v. Berry*, 112 N.H. 125, 290 A.2d 624 (1972); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

I think that Ontario law would be held applicable here under the rationale of the Williams opinion in *Sexton-Storie*. As Justice Williams noted, where both the plaintiff and the defendant are from the same state, that state "generally has an interest in seeing that . . . its citizen defendants are afforded every protection that such citizens would have in their own state,"⁹⁵ and the state where the wrong took place will normally have no interest in the litigation.⁹⁶ Since in this case, the social and economic consequences of the accident and of imposing or denying liability will be felt by the parties in Ontario, the rationale relied on by Justice Williams to hold Michigan law applicable in *Sexton-Storie* would dictate that Ontario law should apply in this "reverse" situation.

As regards the Kavanagh-Levin rationale, the question would be whether the fact that both parties were from Ontario was a "compelling reason" for applying Ontario law in preference to Michigan law. Because of the insubstantiality of Michigan's interest in applying its law to allow recovery in comparison with the interest of Ontario, the parties' home state, in applying its law to deny recovery, there would be a "compelling reason" to displace Michigan law in this case. While it cannot be said for certain how the Michigan Supreme Court would resolve the choice of law issue in this situation—unless and until it is presented in an actual case—my reading of the rationale of the Williams and Kavanagh-Levin opinions in *Sexton-Storie* indicates that the displacement of Michigan law here would be fully consistent with that rationale.

The final situation we may consider is, what in terms of interest analysis is called, the unprovided-for case: the defendant is from a state that imposes liability while the plaintiff is from a state that does not. Suppose that a Michigan host driver and an Ontario guest passenger are involved in an accident in Ontario. In a suit brought by the Ontario passenger against the Michigan driver in Michigan, the driver asserts the defense of guest statute immunity, which is recognized under Ontario law, but not under Michigan law. As we have said, in the ordinary accident case, the states where the parties reside are the states that have a real interest in having their law applied irrespective of where the accident occurred, since the social and economic consequences of the accident and of imposing or denying liability will be felt by the parties in their home state. But here, because the law of the plaintiff's home state would deny recovery while the law of the defendant's home state would allow recovery, neither state has a real interest in having its law applied on the point in issue. While interest analysis can identify the unprovided-for case, it cannot

95. 413 Mich. at 433, 320 N.W.2d at 854.

96. *Id.*

as such provide the means for its resolution.⁹⁷

In this fact-law pattern, the suit is usually brought in the defendant's home state,⁹⁸ and the courts have generally allowed recovery, both where the accident occurs in the defendant's home state and where it occurs in the plaintiff's home state.⁹⁹ One basis of allowing recovery has been that due to the absence of a real interest in either state in having its law applied on the point in issue, the law of the forum allowing recovery should be applied, since there is no good reason for displacing that law.¹⁰⁰ Another basis of allowing recovery, which I have developed, is the common policy rationale.¹⁰¹ Although neither state has a real interest in having its law applied on the point in issue, a functionally sound solution to the unprovided-for case can be found by looking to the common policy of the involved states. Usually the point as to which the laws of the involved states differ involves a substantive rule that is an exception to the common policy reflected in what may be called the general law of both states. Since the state whose law represents an exception to the common policy of both states has no interest in having its law applied in the circumstances of the particular case, the common policy should come to the fore and the exception should not be recognized.¹⁰²

In our guest statute example, all states allow recovery for negligence resulting from an automobile accident, but some, such as Ontario, make an exception when the victim is a passenger in the host's automobile by requiring a showing of a higher degree of negligence in that circumstance.¹⁰³ The only state interested in allow-

97. See the discussion in Sedler, *Governmental Interest Approach*, *supra* note 1, at 233-34.

98. Presumably, plaintiff's counsel chooses to bring suit in the defendant's home state on the very realistic assumption that it is easier to persuade a court to apply its own law than it is to persuade a court to displace its own law in favor of the application of the law of another state.

99. Sedler, *Rules of Choice of Law*, *supra* note 2, at 1038. The only exception appears to be New York, which holds that where, as here, the parties are from different states, the law of the state where the accident occurs applies. So, the result in the unprovided-for case would depend on whether the accident occurred in the plaintiff's home state or in the defendant's home state. See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

100. See *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973).

101. See *Labree v. Major*, 111 R.I. 657, 306 A.2d 808 (1973).

102. See the discussion in Sedler, *Governmental Interest Approach*, *supra* note 1, at 235-36.

103. The most realistic policy behind a rule providing guest statute immunity is to protect the insurer from collusive suits. Other legitimate policies behind such a rule could be to protect the host from suits by ungrateful guests or to protect the insurers by removing this category of cases from the scope of their liability. Assuming that the rule of guest statute immunity reflects all of these policies, the only state interested in applying its law on this issue is the defendant's home state, where the vehicle is insured.

ing that exception to the general policy of liability for negligence is the defendant's home state, since the consequences of imposing liability will be felt by the defendant and the insurer in that state. But when the law of the defendant's home state does not allow this exception, the common policy in favor of recovery should prevail. In our example, therefore, Michigan should apply its own law on the issue of guest-host immunity and deny the defense.

The result in this fact-law pattern is clearly indicated by the Kavanagh-Levin rationale. Michigan law, as the law of the forum, should apply, because there is no "compelling reason" to displace Michigan law.¹⁰⁴ Little guidance is given to the resolution of this fact-law pattern in the Williams rationale. This is because the Chief Justice stressed the interest of the parties' home states in having their law applied in an accident case, and here neither party's home state is interested in having its law applied on the point in issue. However, Chief Justice Williams did make reference to the practice of other states in resolving the choice of law issue presented in particular fact-law patterns—what I have called the rules of choice of law that have emerged from the courts' decisions in conflicts torts cases.¹⁰⁵ It might be relevant under the Williams rationale that in this fact-law pattern recovery generally has been allowed. Again, my prediction here is that the Michigan Supreme Court would hold that Michigan law applied in this fact-law pattern. The application of Michigan law would clearly follow under the Kavanagh-Levin rationale and would not be inconsistent with the Williams rationale.

In the preceding discussion we have tried to predict how the Michigan Supreme Court might decide other fact-law patterns that could be presented in conflicts torts cases. We have tried to do so in light of the holding in *Sexton-Storie* and the rationale of the Williams and Kavanagh-Levin opinions. Cases presenting all of the fact-law patterns we have discussed may not arise, and in *Sexton-Storie* the Michigan Supreme Court did not try to develop an approach to choice of law that was designed to resolve cases that had not yet arisen and that might never arise. If and when cases presenting the different fact-law patterns do arise, the court will decide them, as Justice Williams noted, "in the normal common-law tradition."¹⁰⁶ Such case-by-case adjudication is the essence of judicial method and the policy-centered conflict of laws, which is now the basis of the choice of law process in Michigan.

104. This was the rationale given by the court in *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973).

105. 413 Mich. at 427, 320 N.W.2d at 851.

106. *Id.* at 433, 320 N.W.2d at 854.

IV. CHOICE OF LAW IN MICHIGAN: SOME CONCLUDING OBSERVATIONS

As stated above, choice of law in Michigan will develop through case-by-case adjudication, and the choice of law decision will be rendered with reference to the fact-law pattern presented in the particular case.¹⁰⁷ Until such time as a sufficient number of cases have been resolved by the Michigan Supreme Court, so that a "law" of the conflict of laws has emerged in Michigan, the lower courts and federal courts in diversity cases will have to resolve particular cases in light of the decision of the Michigan Supreme Court in *Sexton-Storie* and the rationale of the Williams and Kavanagh-Levin opinions. Typical of how these courts must approach conflicts cases is the recent decision of the Michigan Court of Appeals in *Smith v. Pierpont*.¹⁰⁸ That case involved a malpractice action resulting from a vasectomy performed by the defendant, a Michigan physician, on the plaintiff, a Michigan resident, at one of the defendant's offices across the state line in Wisconsin.¹⁰⁹ Wisconsin law required that malpractice claims be submitted to mediation, and the defendant moved that the plaintiff's suit in Michigan be dismissed for failure to submit the claim to mediation. The defendant argued for the application of Wisconsin law on the basis of the place of the wrong rule. The court of appeals held that Michigan law applied, and reversed the trial court's order of dismissal.¹¹⁰

The court of appeals reviewed the rationale of the Williams and Kavanagh-Levin opinions in *Sexton-Storie* and concluded that the position of the supreme court was that the law of the place of the

107. Justice Levin noted that the court should not [and did not] attempt to "prognosticate" the disposition of choice of law issues presented outside of the tort area, and took the position that the rules of the traditional approach—such as that the validity of a contract is determined by the law of the place where the contract was made—continued in effect and were binding on the lower courts. *Id.* at 442-43, 320 N.W.2d at 858. Neither the opinion of Chief Justice Williams nor the opinion of Justice Kavanagh discussed this point. With all due respect to Justice Levin, I would submit that the choice of law process that the court adopted in *Sexton-Storie*—which has as its basis judicial method and the policy-centered conflict of laws—constitutes the court's abandonment of the traditional approach and, as far as the lower courts are concerned, analytically leaves open the resolution of choice of law issues in other areas of law. As to choice of law in Michigan in conflicts contracts cases, see Sedler, *Choice of Law in Michigan*, *supra* note 8, at 848 n.107.

108. 123 Mich. App. 33, 333 N.W.2d 165 (1983).

109. Many conflicts cases, such as this one, arise in functional multistate areas, where the state line, although legally real, is of no practical significance in the day-to-day lives of the people living in that area. On the subject generally, see Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394 (1971).

110. 123 Mich. App. at 38, 333 N.W.2d at 168.

wrong would not be applied solely because the accident occurred in that state.¹¹¹ The court of appeals said that it favored the Kavanagh-Levin rationale, and said that there was a "presumption" in favor of the law of the forum in tort cases.¹¹² In holding that Michigan law applied in the instant case, the court stated:

All parties are residents of Michigan, and a state has a significant interest in applying its own substantive law to its citizens. On the other hand, we find no superior Wisconsin interest in having its substantive law applied, especially since the injury did not affect any Wisconsin residents or property.¹¹³

Smith v. Pierpont presented the same fact-law pattern as that presented in *Sexton-Storie*: the plaintiff and defendant were both residents of Michigan and the harm occurred in another state. The factual situation in *Smith*, however, was somewhat different from the factual situation in *Sexton-Storie* where the defendant's sole contact with the accident state was the accident itself. In *Smith v. Pierpont*, the injury arose from a medical procedure performed in a state whose law required mediation of malpractice disputes. It could be contended that Wisconsin has an interest in requiring mediation whenever the alleged malpractice was committed in Wisconsin by a physician having an office there.

As the court of appeals correctly observed, however, Michigan's interest is the same whenever both the plaintiff and the defendant are Michigan residents, and the primary factor calling for the application of Michigan law in *Sexton-Storie*, under both the Williams and Kavanagh-Levin rationales, was Michigan's strong interest in applying its own law whenever both of the parties were Michigan residents. Since the fact-law pattern presented in *Smith* was the same as the fact-law pattern presented in *Sexton-Storie*, Michigan's interest in having its law applied was the same in both instances. Thus, the reasons calling for the application of Michigan law in *Sexton-Storie* likewise called for the application of Michigan law in *Smith*. So, whenever both parties to a tort action arising in another state are Michigan residents, Michigan law applies regardless of the nature of the tort, and regardless of the issue as to which the laws of Michigan and the other involved state differ. The holding of *Sexton-Storie* was that Michigan law applies when both parties to a tort action arising in another state are Michigan residents, and that holding controlled the result in

111. *Id.* at 36, 333 N.W.2d at 167.

112. *Id.* at 38, 333 N.W.2d at 168.

113. *Id.*

Smith, notwithstanding the different factual situation presented in that case.¹¹⁴

Smith illustrates the operation of judicial method and the policy-centered conflict of laws in practice. Since that case presented the same fact-law pattern as that presented in *Sexton-Storie*, the holding in *Sexton-Storie* controlled, and Michigan law was applied. As cases presenting other fact-law patterns arise, the Michigan courts will resolve those cases with reference to the fact-law pattern presented in the particular case and on the basis of considerations of policy and fairness to the parties.

In my earlier study of conflicts law in Michigan, I concluded that, "[c]hoice of law in Michigan is in a shambles."¹¹⁵ With the decision in *Sexton-Storie* and the adoption of judicial method and the policy-centered conflict of laws as the basis of the choice of law process in Michigan, we begin a new era in choice of law. I would confidently predict that in Michigan, as elsewhere, the courts now will achieve functionally sound and fair results in the conflicts cases coming before them for decision.

114. Cases presenting the same fact-law pattern generally are decided the same way by a court notwithstanding a difference in the factual situation. For example, in *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), where New York parties were involved in an accident in Ontario, a guest statute state, the trip originated in New York and was to end there. In *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), New York parties were involved in an accident in Michigan, then a guest statute state. In *Tooker*, however, the driver and the passenger were students at Michigan State University, and the accident occurred on a trip from East Lansing to Detroit. Since the fact-law pattern was the same in both *Tooker* and *Babcock*, New York law was held to apply on the issue of guest-host immunity.

115. Sedler, *Choice of Law in Michigan*, *supra* note 8, at 847.